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Ooi Hock Kheng v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–250 OF 2010
AZAHAR MOHAMED, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
30 JUNE 2014

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person caught carrying bag containing 476.65g ketamine — Accused person charged in High Court and convicted and sentenced to death — Appeal to Court of Appeal against decision of High Court — Whether accused person's act of carrying bag could signify as trafficking — Whether trial judge correct in arriving at decision that accused person was trafficking drugs — Whether accused person in passive possession — Whether conviction and sentence safe — Dangerous Drugs Act 1952

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Upon information received, police inspector PW4 and his team had organised a raiding plan at a targeted area. After keeping surveillance, PW4 saw a motor scooter ridden by the appellant entering the area. There was a green plastic bag ('the bag') being hung on the left handle of the motor scooter. As the appellant got off the motor scooter, taking the bag with him and made a move towards the entrance, PW4 and his team sprung into action. The appellant was successfully arrested and it was discovered that inside the bag was a brown paper package which was later confirmed by the chemist to be 476.65g of ketamine. Subsequently, the appellant was charged in the High Court for trafficking in dangerous drugs, an offence under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). The appellants defence was that he was only in passive possession of the ketamine. At the conclusion of the trial, the judicial commissioner ('JC') convicted the appellant for the offence and sentenced him to mandatory death penalty. His Lordship held that there was trafficking based on s 37(d) and the act of 'carrying' under s 2 of the DDA. Hence, the present appeal against the decision of the trial judge. It was argued by the appellant that the trial judge erred in arriving at such decision.

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Held, allowing the appeal:

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(1) It could not be disputed that at the material time, the appellant was in fact carrying the impugned ketamine. However, the mere act of carrying was not sufficient to constitute the offence of trafficking under the DDA. In other words, the act of mere carrying would not make one a trafficker under the scheme of the DDA (see para 8).

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(2) The JC had misdirected himself in that there was no appreciation that to traffic in dangerous drugs under s 2 of the DDA entailed something more than passive possession. In the context of the present case, to constitute the offence of trafficking, the act of 'carrying' ketamine by the appellant from one place to another was in the sense of doing so as to promote the distribution or supply of the impugned drug to someone else. This was never considered by the JC and he failed to direct his mind on this point (see para 8).

(3) The drugs involved was ketamine, which is categorised as a Schedule 1 drug in the DDA. The trafficking presumption under s 37(da) of the DDA did not apply to ketamine. A close reading of the judgment of the JC revealed that he did not judicially appreciate that there ought to be direct evidence of trafficking or affirmative evidence of trafficking. Likewise, the JC also did not recognise that the amount of ketamine was only 467.65g (see para 9).

(4) This was a case of passive possession and not trafficking. The evidence showed that the appellant was in possession of the ketamine. The conduct of disposing the plastic bag, the acts of flight and struggle only showed that the appellant had knowledge of the contents of the bag to be ketamine. The failed to appreciate that other than an act of passive possession, there was no overt act on the part of the appellant to traffic the impugned drugs. Nowhere in his judgment had the JC made a finding to the effect that the purpose for which the appellant was in possession of the ketamine he was carrying was to transfer the possession of the said ketamine to someone else. This was a serious non-direction which amounted to a misdirection by the JC warranting appellate intervention (see para 10).

(5) The JC had invoked s 37(d) of the DDA to prove possession of the appellant of the ketamine in the plastic bag. The statutory presumption of possession under s 37(d) was a rebuttable presumption. It was incumbent on the JC to consider at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of probabilities. The JC had failed to direct his mind on this point (see para 12).

(6) The conviction and the death sentence of the High Court was set aside and substituted with one of possession under s 12(2) and punishable under s 12(3) of the DDA. The appellant was sentenced to five years imprisonment from the date of arrest (see para 17).

[Bahasa Malaysia summary

Di atas maklumat yang diterima, inspektor polis PW4 dan pasukannya telah merancang pelan serangan di kawasan sasaran. Selepas membuat pengawasan, PW4 melihat skuter motor yang ditunggang oleh perayu memasuki kawasan

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tersebut. Terdapat beg plastik berwarna hijau ('beg') yang digantung pada pemegang kiri skuter motor. Setelah perayu turun daripada skuter motor, dengan mengambil beg tersebut bersamanya dan bergerak ke arah pintu masuk, PW4 dan pasukannya mula bertindak. Perayu berjaya ditangkap dan didapati bahawa dalam beg terdapat paket kertas berwarna perang yang mana kemudiannya disahkan oleh ahli kimia sebagai 476.65g ketamine. Perayu kemudiannya dituduh di Mahkamah Tinggi mengedar dadah berbahaya, kesalahan di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Pembelaan perayu adalah bahawa dia hanya mempunyai milikan pasif ketamine. Pada akhir perbicaraan, pesuruhjaya kehakiman ('PK') mensabitkan perayu untuk kesalahan dan menjatuhkan hukuman mati mandatori. Yang Arif memutuskan bahawa terdapat pengedaran berdasarkan s 37(d) dan tindakan 'carrying' di bawah s 2 ADB. Oleh itu, rayuan ini terhadap keputusan hakim perbicaraan. Ia dihujahkan oleh perayu bahawa hakim perbicaraan tersilap dalam mencapai keputusan sedemikian.

Diputuskan, membenarkan rayuan:

(1) Ia tidak dapat dipertikaikan bahawa pada masa material, perayu sebenarnya membawa ketamine tersebut. Walau bagaimanapun, tindakan membawa semata-mata tidak mencukupi untuk membentuk kesalahan pengedaran di bawah ADB. Dalam erti kata lain, tindakan semata-mata membawa tidak akan membuat seseorang pengedar dadah di bawah skim ADB (lihat perenggan 8).

(2) PK tersalah arah dirinya di mana tidak terdapat penilaian kepada pengedaran dadah berbahaya di bawah s 2 ADB memerlukan sesuatu yang lebih daripada milikan pasif. Dalam konteks kes ini, untuk membentuk kesalahan pengedaran, tindakan 'carrying' ketamine oleh perayu daripada satu tempat ke tempat yang lain bermaksud berbuat sedemikian seperti untuk menggalakkan pengagihan atau pembekalan dadah tersebut kepada seorang yang lain. Ini tidak pernah dipertimbangkan oleh PK dan beliau gagal untuk mengarahkan mindanya ke atas poin ini (lihat perenggan 8).

(3) Dadah yang terlibat adalah ketamine, yang mana dikategori sebagai dadah Jadual 1 di dalam ADB. Anggapan pengedaran di bawah s 37(da) ADB tidak digunapakai kepada ketamine. Pembacaan teliti penghakiman PK menunjukkan bahawa dia tidak menilai secara kehakiman bahawa patut terdapat keterangan terus pengedaran atau keterangan afirmatif pengedaran. PK juga tidak mengenal pasti bahawa jumlah ketamine adalah hanya 467.65g (lihat perenggan 9).

(4) Ini adalah kes milikan pasif dan bukan pengedaran. Keterangan menunjukkan bahawa perayu dalam milikan ketamine. Kelakuan membuang beg plastik, tindakan berlari dan bergelut hanya menunjukkan bahawa perayu mempunyai pengetahuan mengenai

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kandungan beg adalah ketamine. Beliau gagal untuk menilai bahawa selain daripada tindakan milikan pasif, tiada tindakan terang-terangan oleh pihak perayu kepada pengedaran dadah tersebut. Tiada terdapat di mana-mana dalam penghakimannya, PK membuat dapatan untuk memberikan kesan bahawa tujuan di mana perayu memiliki ketamine yang dibawanya adalah untuk memindahkan milikan ketamine tersebut kepada orang lain. Ini adalah tidak ada salah arah serius yang menjumlahkan kepada salah arah oleh PK mewajarkan campur tangan mahkamah rayuan (lihat perenggan 10).

(5) PK telah membangkitkan s 37(d) ADB untuk membuktikan milikan perayu terhadap ketamine dalam beg plastik tersebut. Anggapan statutori milikan di bawah s 37(d) adalah anggapan yang boleh dipatahkan. Adalah wajib ke atas PK untuk mempertimbangkan pada akhir keselurahan kes sama ada anggapan yang dibangkitkan beliau telah dipatahkan atas imbangan kebarangkalian. PK gagal untuk mengarahkan mindanya ke atas poin ini (lihat perenggan 12).

(6) Sabitan dan hukuman mati Mahkamah Tinggi diketepikan dan digantikan dengan satu milikan di bawah s 12(2) dan boleh dihukum di bawah s 12(3) ADB. Perayu dihukum penjara lima tahun dari tarikh tangkapan (lihat perenggan 17).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)
Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (distd)
PP v Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113, CA (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514; [1995] 4 CLJ 456, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 2, 12(2), (3), 37(da), 39B(2), Schedule 1

Appeal from: Criminal Trial No 45–80 of 2008 (High Court, Pulau Pinang)

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Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Yusaini Amer Abdul Karim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] The appellant was charged and tried before the Penang High Court for trafficking in 467.65g of dangerous drugs, namely Ketamine, an offence under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'), and punishable under s 39B(2) of the DDA. The offence was said to have been committed on 20 February 2008 at about 6.40pm at the vicinity around the block of Flats described as Blok 50, Taman Yew Lean, Jalan Slim, Georgetown, Penang.

[2] The learned judicial commissioner ('JC') at the conclusion of the trial convicted the appellant and sentenced him to the mandatory death penalty prescribed by the DDA. Aggrieved by that decision, the appellant appealed to this court.

[3] The prosecution evidence presented at the trial is quite straightforward and in brief, it is as follows. Upon information received, Chief Insp Santhanadas a/l Venugopal ('PW4') assembled a team of narcotic police officers. He briefed them on the information and organised a raiding plan. After the said briefing, PW4 and his team proceeded to the targeted area. There, they took up ambush positions and kept a close surveillance. The area was fenced and there was only one entrance.

[4] At around 6.40pm, PW4 saw a Suzuki motor scooter bearing registration No PFJ 3214 ridden by the appellant entering the area. At that moment, PW4 observed that there was a green plastic bag being hung on the left handle of the motor scooter. The appellant then parked the motor scooter. He got off the motor scooter and took off the helmet. The appellant then took the green plastic bag from the handle and walked toward the entrance of the block of flats.

[5] At that point, PW4 and his men ambushed the appellant and introduced themselves by shouting 'Polis'. The appellant turned around, threw the plastic bag and fled. PW4 and his men gave chase and succeeded in arresting the appellant. Thereafter, the appellant was brought to the spot where the green plastic bag was after being thrown. In the plastic bag was a brown paper package. Inside it were six transparent plastic packages containing whitish powdery substances.

[6] The six transparent plastic packages were subsequently sent to the Chemistry Department for chemical examination and analysis. They were later

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confirmed by the chemist, Siti Nur Azirawati bt Idris ('PW3') to contain ketamine weighing in total 476.65g, which formed the subject matter of the charge against the appellant.

[7] The principal ground raised by learned counsel for the appellant in this appeal was that the learned JC had erred when he found that there was trafficking based on s 37(d) and the act of 'carrying' under s 2 of the DDA. In his judgment, the learned JC said:

> Keterangan pihak pendakwaan menunjukkan tertuduh sedang menjinjing beg plastik hijau yang mengandungi dadah ketamine di tangan kiri beliau setelah beliau turun dan motor scooter dan hendak berjalan kaki batik ke arah pintu masuk pangsapuri.
>
> Memakaikan tafsiran ini kepada fakta kes, peruntukan seksyen 2 Akta 234 terpakai sebab ia mentafsirkan pengedaran di antara lain, yang juga merangkumi perbuatan 'carrying' sepertimana yang di lakukan oleh tertuduh dalam kes ini.

[8] It cannot be disputed that at the material time, the appellant was in fact carrying the impugned Ketamine. However, the mere act of carrying is not sufficient to constitute the offence of trafficking under the DDA. In other words, the act of mere carrying does not make one a trafficker under the scheme of the DDA. This is made clear from the judgment of Arifin Zakaria FCJ (as His Lordship then was) in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129). That case represents the law on this subject as we apply today. In our judgment, the learned JC had misdirected himself in that there was no appreciation that to traffic in dangerous drugs under s 2 of the DDA entails something more than passive possession. In the context of the present case, to constitute the offence of trafficking, the act of 'carrying' Ketamine by the appellant from one place to another was in the sense of doing so as to promote the distribution or supply of the impugned drug to someone else (see *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64). This was never considered by the learned JC and he failed to direct his mind on this point.

[9] In deciding this issue, the point to note is that the drugs involved was Ketamine, which is categorised as a Schedule 1 drug in the DDA. It is pertinent to note that the trafficking presumption under s 37(da) of the DDA does not apply to ketamine. In this regard, a close reading of the judgment of the learned JC revealed that he did not judicially appreciate that there ought to be direct evidence of trafficking or affirmative evidence of trafficking. Likewise, the learned JC also did not recognise that the amount of ketamine is only 467.65g. In *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65 this court said:

> To summarise, the fact that the accused is transporting a quantity of drugs from one

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point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

[10] This brings us to the submission of learned counsel that the appellant was only in passive possession of the ketamine. Nowhere in his judgment had the learned JC made a finding to the effect that the purpose for which the appellant was in possession of the ketamine he was carrying was to transfer the possession of the said Ketamine to someone else. In our view, this is a serious non-direction which amounts to a misdirection by the learned JC warranting appellate intervention (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1).

[11] In our judgment, at the highest, this was a case of passive possession and not trafficking. The evidence shows that the appellant was in possession of the ketamine. This is an undisputable fact. The conduct of disposing the plastic bag, the acts of flight and struggle only show that the appellant had knowledge of the contents of the bag to be ketamine. The learned JC erred in that he failed to appreciate that other than an act of passive possession, there was no overt act on the part of the appellant to traffic the impugned drugs.

[12] There is another reason why we had allowed this appeal. At the conclusion of the case for the prosecution, the learned JC had invoked s 37(d) of the DDA to prove possession of the appellant of the Ketamine in the plastic bag. The statutory presumption of possession under s 37(d) is a rebuttable presumption. For this reason, it is incumbent on the learned JC to consider at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of probabilities. A reading of the judgment of the learned JC shows that he had failed to direct his mind on this point. This is a serious misdirection as the law requires the learned JC to make such a finding when he resorted to the presumption under s 37(d) of the DDA (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705, *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514; [1995] 4 CLJ 456 and *Public Prosecutor v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113).

[13] In resisting this appeal, the learned deputy public prosecutor ('DPP') urged us to apply the proviso to s 60(1) of the Courts of Judicature Act 1964:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

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[14] To support his submission, learned DPP drew our attention to the case of *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193. In that case the appellant was charged with trafficking in 62.09g of heroin. The drug was carried in small plastic packets each containing a small quantity of the drugs. According to the evidence, 39.77g of heroin was found in a number of small plastic packets tucked in his waist, while 50 small plastic rackets containing 9.09g of heroin was found in the right side pocket and another 30 small plastic packets containing 5.57g heroin was found in the left side pocket of the track top he was wearing. A total of 20 small plastic packets were found in each of the right and left pockets of his trousers, containing a total of 7.66g of heroin. It was against this background evidence, the Federal Court held that the appellant in that case was not just a passive carrier and as such, the proviso ought to be invoked. Arifin Zakaria FCJ (as His Lordship then was) in delivering the judgment of the Federal Court said:

> Judging from the manner the drug was being carried ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may be drawn is that the respondent was in fact carrying it for the purpose of trafficking.

[15] Cleary, therefore, the case of *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* relied on by the learned DPP is distinguishable on its facts. On the facts and the prevailing circumstances of the present case, we were satisfied that even if the learned JC had properly directed himself, he would have come to the finding that this was just a case of passive possession and not trafficking.

[16] It is an established principle that the proviso is only to be invoked in exceptional circumstances (see *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381). In the present case, the evidence does not show or prove a transfer of possession or that the drugs were to be supplied to another person. In our judgment, there was nothing exceptional regarding the evidence of the present case against the appellant; there was no valid reason for us to invoke the proviso.

[17] This appeal was, therefore, allowed. Accordingly, we quashed and set aside the conviction and the death sentence of the High Court and we substituted it with one of possession under s 12(2) and punishable under s 12(3) of the DDA. The appellant was sentenced to five years imprisonment from the date of arrest.

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A *Appeal allowed.*

Reported by Afiq Mohamad Noor

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